

Gilbert Marcus

LRC Oral History Project

31st July 2008

Note: Partial Embargo until death

This interview transcript was substantially edited by the interviewee and specific excerpts are placed under embargo.

The audio version of this interview will not be made available under the embargo.

Int This is an interview with Gilbert Marcus and it's Thursday the 31st of July (2008). Gilbert, on behalf of SALS Foundation, Washington, DC, we'd really like to thank you for taking the time to participate in the LRC Oral History Project. I wondered whether we could start the interview, if you could talk about your early childhood memories, growing up in South Africa, and also where you think your sense of social justice and injustice developed?

GM Well, I'm a South African born and bred, apart from a short stint in England for further study, I've lived in South Africa all my life. I came from a family with an extremely well developed sense of social justice. My mother fled the Nazi invasion of Czechoslovakia in 1939 at the age of sixteen. Apart from her immediate family, that is her mother and father, brother and sister, probably most of her family were victims of the Holocaust. My father fought in the Second World War and I suppose the combination of a father who had fought against tyranny, a mother who in a sense, in a very real sense, was a victim of that tyranny, had a very profound influence on my life and on my thinking. So, that I suppose was the most important influence in the way I developed and the way I suppose I approached or viewed the situation in South Africa. Certainly I would regard my upbringing as being a very political one in the sense of a household with a very keen awareness of political issues and the racial injustice in South Africa. *(recording turned off)*

(Recording resumes)

Int Right, you were saying about your family background...?

GM Interestingly, when my mother and her family fled Czechoslovakia in 1939, they tried to come to South Africa but couldn't. Because in 1939 South Africa was not accepting Jewish refugees. So in fact she went to what was then known as Rhodesia, now Zimbabwe, and that's where she met my father when he returned or was returning to South Africa at the end of the war, and he passed through Bulawayo where he met her.

Int I was just wondering why South Africa wasn't accepting the refugees, what was the background to that?

GM Well, historically South Africa was bitterly divided over participation in the Second World War. And there was certainly a substantial element in South Africa, which was sympathetic to the Nazi cause. John Vorster, for example, was interned during that period and I suppose that at that point South Africa was not politically ready to accept Jewish refugees.

Int Gilbert, growing up in South Africa, in terms of...your family background alone makes you...more understanding of people and their circumstances, but more generally growing up in South Africa, the schooling system, your processes of socialisation, what do you think actually led to you...having an acute sense of social justice?

GM Probably two things. The first, I think, and most fundamentally was my family upbringing, my mother and my father who by virtue of their own experiences were acutely aware of oppression. And their experiences translated into, I think, an important understanding of racial oppression in South Africa. But I suppose formatively another powerful influence on me were my years at university. I was at the University of the Witwatersrand for the period 1974 to 1979. So, in the very midst of my university career, the Soweto uprising occurred and that had a very profound effect on the history of South Africa, and certainly impacted very strongly on my own views of what was happening and life at university. The campus was in turmoil, nobody who thought about anything in South Africa could have been unaffected by what was going on. My girlfriend, who became my wife at the time, was a social worker and was doing a lot of work at that time in the so-called coloured communities around Johannesburg where there were major problems with school, schooling and the schools boycott. So I was just really brought up in an intensely political environment.

Int Right. In terms of high school, do you think political awareness developed there or was it really at university?

GM You know, I went to a government school, a very good government school, called King Edward the Seventh High School. And...politics was essentially a no-go area in South African schools. By that, I mean, that...that's an odd thing to say because in a sense the method of education was of course political. I'm...by saying a no-go area I mean, it was not an environment in which politics was discussed in any significant sense at all. I certainly was with a group of people who by virtue of their own upbringings had a, I think, a somewhat different sense of political awareness from the average. And so within my social circle there was certainly an appreciation of what was going on in South Africa and, you know, some of my friends had had a similar upbringing, some of them had come from very, very political families. I in fact went right through school literally from grade one to matric with William Kentridge, the son of Sydney and Felicia (Kentridge), who was my closest friend at school, and so he too had an important political upbringing. And another friend of mine, Norman Benjamin, was the son of a woman who had been banned under the security laws, and so these were the sort of shared experiences that we had. But the school didn't do a great deal to foster a particular political awareness. There were, as is inevitable, individual teachers, a minority it must be said, who in their own way tried to foster a sense of respect for others, and in that way of course, that was influential as well.

Int I'm wondering, when you get to university, you're really on the cusp of political activity such as 1976, which as you mentioned has a profound effect on the society. How about a profound effect on you? How did that shape you?

GM Well...at university I was exposed to political activism. There were important people in the student movement to which I had exposure. My first year at university was 1974. That was a year of a general election in South Africa. Of courses it was a white's only election and there was an enormous amount of political campaigning on campus around that election. And of course one is slightly older, one is in an environment where you are expected to question, and I think that that certainly honed an awareness of what was going on in ways, which I think might have been otherwise difficult. At that time the sixties, seventies and eighties, South Africa was a society absolutely devastated by censorship, and interestingly in my early legal career I did an enormous amount of work on freedom of expression, we can come back to that later. At university one was exposed to at least the potential for sources of information about what was going on in South Africa that were not readily available to other people. I mean, I remember for example in 1976, the South African Defence Force invaded Angola. It was officially denied. In fact it was denied until three/four months into the invasion when literally soldiers were coming back in body bags. We were listening to the BBC on shortwave radios, trying to find out what was going on. So, I do think it was an environment which raised questions in which one was expected to go beyond the mainstream media and the press, and of course as one discovered that we weren't being told the truth, that too heightened ones awareness of what was going on.

Int The point...and it's a very important point at which you were at university because NUSAS was really very active but also there had been a split with the black students association, SASO and NUSAS...

GM Correct.

Int ...and I wondered whether you could talk about that?

GM Sure. I was at university at a critical time for NUSAS. Critical in really two senses. NUSAS had an interesting structure in the sense that universities could vote whether to affiliate to NUSAS or not. And there were...NUSAS were certainly under strain in the mid seventies, there's no doubt about it, and it was under strain for two reasons. It was under strain from the white right who campaigned incredibly actively to disaffiliate from NUSAS and it was under strain because of the split with the South African Students Movement. So NUSAS was really trying to look for a place to define its role. And, so, from that perspective it was also interesting, and interestingly enough, some of the leading lights in the Legal Resources Centre, some of those who became leading lights in the Legal Resources Centre, who were a few years older than me but they were people to whom I nevertheless had some exposure. Geoff Budlender, Charles Nupen, were...Paul Pretorius, were older than me but they were people of whom I was aware. Charles (Nupen) was involved as an accused as you probably know in a terrorism trial in the mid seventies. Geoff (Budlender) was one of

the attorneys. These were people that I knew. Not well but as a younger student I had exposure to them as leaders in the student movement.

Int Right. And in terms of the actual split with the Black Consciousness movement and SASO, do you know much about that?

GM Not from personal involvement. I was a member of the Students Representative Council at Wits in '78 to '79. But I didn't have a direct involvement in that particular split. Of course I was on campus in 1977 when (Steve) Biko was killed and of course that, being on a campus...the majority of white South Africans had never heard of Steve Biko; we knew exactly who Steve Biko was because of his involvement and his influence on student politics.

Int Sure. Gilbert, if I can take you slightly back, in terms of looking at what were some of the formative influences that may have led you into the legal profession, I wondered where those may have arisen?

GM It's a difficult question because I'm not sure I can pinpoint it myself. I certainly know that from a relatively young age, you know, early teenage years, I knew that I wanted to be a lawyer. My career took a somewhat different path because I had it in my mind, certainly at a younger age, that I wanted to be a patent lawyer, believe it or not. And in fact my first year at university I did a first year of Science, a BSc, in which I failed every subject except English (laughter). In order to do a BSc you had to do one Arts subject. So with a view to doing a BSc LLB, the one Arts subject I did was English and that was the only subject I passed. I think that was actually important in my political development as well because just the change from the Science to the Arts gives you a different kind of exposure, so I do think that was important. So my dream of being a patent lawyer was extremely short-lived and something for which today I'm very grateful.

Int Why a patent lawyer? Where do you think that comes from?

GM Well...it was probably because at school...um...two of the subjects that I did well in were maths and science, and...although I did well in English as well. So it just seemed to me that if I was going to go into law, this was a route as it were which would enable me to carry on with maths and science and use that in a legal setting. Very short-lived.

Int (laughs) You clearly had a very well defined sense of what you wanted to do. Do you have a sense of whether that may have come from family or just the fact that you thought the law was important for various reasons?

GM Um...again, I think it's probably a combination of things, it's difficult to pinpoint a single source. I mean, one of the things that always intrigued me was...is why the law failed in Nazi Germany, and how it was possible for everything that the law ought to

stand for to simply disintegrate. And I have to say that given the background particularly of my mother that the parallels between Nazi Germany and South Africa were striking. And I think that that probably was something, which ignited my imagination. But with a sense of unease to as to how in a particular set of circumstances the law can absolutely fail. And of course it became one of the major, major debates in the eighties; a debate which I think was in fact central to the formation of the Legal Resources Centre and CALS at the time, about what role law could play in an unjust society and whether there was scope for lawyers in an unjust society. And the extent of complicity by lawyers, well meaning lawyers, left wing lawyers, in an unjust legal system. I think those are terribly important debates. They raged in the eighties, they're controversial issues and I think very important.

Int Absolutely. I wonder if you could go over those again when we talk about CALS and the Legal Resources Centre?

GM Sure.

Int So...did you go on to do a BA LLB?

GM After my dramatic failure in Science, I changed to a BA, because (laughs) English was the only subject I'd passed, the rules of the university required me to repeat English. So I then enrolled for a BA major in English and in Law and doing the other requisite subjects for an LLB, so I did Afrikaans, which was then compulsory, and Latin, which was also compulsory. Which left me with very, very few other options in my BA. My other options I did Sociology 1, and probably the one course that I enjoyed more than probably anything I did in my BA, which was History and Appreciation of Music.

Int Ok. Gilbert...when you were at university, from what I can understand Felicia Kentridge had set up the Legal Aid Clinics, now I wondered whether you could talk a bit about that?

GM Absolutely. I think that is important. One of the options, which was available in the LLB, so this is postgraduate, was a brand new subject called Practical Legal Studies. To the best of my memory that was established for the first time in 1978, and I did it again to the best of my memory in my final year in 1979. Practical legal studies was essentially run by the Legal Resources Centre. It included formal lectures on the practical application of law, and it required work in the clinic, which was run by Felicia Kentridge, but that was part of the course. One had to work in the clinic. Two of the people included in the teaching of practical legal studies were Arthur Chaskalson and Geoff Budlender. So this was taking place in my final year and it was the most amazing thing for me at any rate. Here was Arthur (Chaskalson) who was an absolute giant in the legal profession, coming to Wits, teaching us, and also exposing us to aspects of law, which were very far from mainstream. In the lectures and in the practical exercises that we were given to do, the topics were carefully chosen, they covered things like what was then the issues relating to Labour Law and the pass laws, freedom of movement within South Africa. These were not things that were in

the mainstream by any stretch of the imagination, and it was I think very, very important for me in really then thinking very seriously about moving in a human rights direction as a professional. I certainly think that my exposure to Geoff (Budlender) and Arthur (Chaskalson) and Felicia (Kentridge) in the clinic had a very, very important influence on me. Because what happened thereafter is I then started my Articles at Webber Wentzel. In the middle of my Articles I interrupted them to go and study at Cambridge. And it was definitely that year that I was away, in '80/'81, that I took the decision that I was definitely not going to practise mainstream law. At Cambridge one of the courses I did was human rights law. One of the other subjects I did was judicial review of administrative action in which I was taught by one of the real, real leading lights in Administrative Law, Professor (H.W.R) Wade. And I actually decided while I was away that when I'd finished my Articles I was either going to join the Legal Resources Centre for the Centre for Applied Legal Studies. That year away, at a quite difficult time in South Africa's history, it was a time of substantial upheaval, particularly in the educational sphere...

Int School boycotts?

GM The school boycotts. The distance from South Africa, the exposure to things that could not be published in South Africa that we were receiving in England, I actually decided then and then I would finish my Articles and I would do my pupillage to become an advocate and there were really only two choices open to me at that time...well, two choices open to anybody who wanted to do public interest law. And that was either the Legal Resources Centre or the Centre for Applied Legal Studies. I opted for the Centre for Applied Legal Studies, mainly because it provided a slightly more flexible option for the things that I wanted to do. CALS offered an environment in which one could practise, at least to a limited extent. One could teach and one could do research. And it was that sort of combination, which I found attractive, whereas the Legal Resources Centre was primarily almost exclusively designed for practitioners in public interest law. So it was just the wider spectrum, which CALS offered, which I found very attractive at that time.

Int So you went to do an LLM at Cambridge?

GM It was then called an LLB. I understand I can convert it. I have never converted it so I still have an LLB from Cambridge, yes.

Int And then you came back and you started immediately at CALS?

GM No. I came back, I finished my Articles...

Int With Webber Wentzel?

GM Yes. I got admitted as an attorney because I thought that having done two years of Articles, having written that dreadful attorney's admission exam, I thought I should at

least have the benefit of being admitted as an attorney, but the day I was admitted as an attorney I gave the requisite thirty day notice to have my name removed from the roll of attorneys, so that's what I did and I then did my pupillage. But I did my pupillage having decided and it having been agreed with John Dugard, that after my pupillage I would come to CALS. So I did my pupillage with a view to going to CALS as an advocate.

Int Right. So when you started off at CALS, John Dugard was there. Who else was there? I understand Fink (Haysom) was involved and Halton (Cheadle)...

GM Ya. The...CALS at that stage was...the lawyers at CALS at any rate, was: John Dugard was the director, Halton Cheadle, Fink Haysom, Paul Benjamin, and I joined at the same time as a colleague of mine, who in fact was with me at Webber Wentzel, Clive Thompson, and Clive (Thompson) was a Labour Law specialist and did work at CALS in the labour sphere.

Int Right. I've interviewed other people and they say that this was quite a rigorous environment, very hard working but...very competitive individuals working in one space. What was your experience?

GM Um...that's an interesting take. I should add, after a few years Edwin Cameron joined us. I think Edwin (Cameron) joined in 1986 but no doubt he would have told you that himself. And Edwin (Cameron) and I were extremely and remain very close friends. So Edwin (Cameron) joined in afterwards. That it was a hard working environment **inaudible** absolutely no doubt. It was an extremely hard working environment and there were political developments in South Africa, which really placed a great strain on really everybody who was doing anything remotely connected with public interest law. I never felt a sense of competition with my colleagues at CALS at all. On the contrary. One of the nicest things about CALS, which I think was so important at the time, is that although we...although there was an overlap in the areas in which we were working, in general we each had our own area on which we concentrated, but to me the hallmark of working with those people that I've mentioned, was how incredibly supportive they were. And so I didn't...I never felt that sense of competition. There may well have been a sense of competition in a different sphere in the sense that this was not mainstream work, there was...there was opposition, I should tell you, from the mainstream profession. The very establishment of CALS created difficulties. I had...I won't call them difficulties but it was not plain sailing that I could go to CALS as an advocate and remain a member of the Bar. In fact were it not for Arthur (Chaskalson), I'm not sure that that would have been permitted. The Bar had permitted Arthur (Chaskalson) to do precisely that, but CALS was not the same as the Legal Resources Centre. I got permission from the Bar Council to go to CALS as an advocate but there was a condition attached to it. The condition was, well, if I ever wanted to come back to the Bar they were not prepared to give me a guarantee that I would not have to repeat my pupillage. Well, which was fine. I wasn't entirely upset about that. But Arthur (Chaskalson) managed to swing that for me. And I think there was...there was a competitiveness in the sense that, I think that some of us felt a bit under siege from the organised legal profession. But I never felt a sense of competition amongst ourselves. There was a...I need to choose my words carefully

now and I suspect I'll get the wrong word, but there was something of a rivalry. I don't want to overplay it. There was certainly something of a rivalry between CALS and the Legal Resources Centre. Which I think was very, very unfortunate and I think was in the main, largely unnecessary. That...I think that that has a lot to do with a sort of sense of grievance which John Dugard had with...in the first instance I think with the organised legal profession. John (Dugard), I think it must be said, was not well treated by the Bar. There was a rule of the Bar, which precluded members of the Bar from appearing in cases with non-members. That was the rule. It was subject to exceptions, you could get permission to appear with a member of the Bar. So the original conception, as I understand it, was that there would be very, very close co-operation between CALS and the Legal Resources Centre. CALS was conceived as the research wing of the Legal Resources Centre. The Legal Resources Centre would be the litigation wing, but in a sense they would be two halves of a whole. That didn't work out. As I say, one of the reasons, and I'm not suggesting it was the sole reason, but one of the reasons was that the Bar in a very sort of rigid and complete unnecessary way refused to give John Dugard permission to appear with...I can't remember whether it was with Arthur (Chaskalson), but it was certainly...in fact I think it was in one of the Group Areas cases...it doesn't really matter...so John (Dugard) had quite a sense of grievance with the Bar, whereas the Legal Resources Centre had the blessing of the Bar. I think John (Dugard) resented that. I think that there was a sense of professional rivalry between John (Dugard) and Arthur (Chaskalson), which was ridiculous in my view, but it existed. I of course was not there when the two organisations started, I joined CALS in 1983. But certainly there was no doubt that there was that tension, and I have to say that I think that it emanated largely from John (Dugard) and not from Arthur (Chaskalson). I never picked up a sense from Arthur (Chaskalson) at all that this was a source of concern for him. I think it was the other way around.

Int That's really interesting. Gilbert....of course CALS and the Legal Resources Centre were also competing for the same pool of money, largely from American donors, and I wondered whether you knew much about that?

GM Fortunately I was spared all fundraising duties at CALS. So what I say is at the level of impression, it's absolutely clear that the founders of both organisations were essentially the Ford Foundation and the Carnegie Foundation.

Int Rockefeller?

GM Rockefeller, quite correct. And I...I might be wrong in this but I never, in the period that I was there, I never had a sense that there was a problem with those founders, funding founders, in relation to CALS and that we were in a sense competing. The budget for Legal Resources Centre was massive compared to CALS. I, as I say, I might be wrong in this but I never thought that we were fighting for money. I might be wrong in that but that was not something I was aware of.

Int Sure. Given your association with the Kentridges and also knowing Arthur (Chaskalson) very well...it's often been said that Arthur (Chaskalson) started the

Legal Resources Centre, but of course Felicia Kentridge played a huge role, particularly when it came to securing funding, and I wondered whether you knew much about that?

GM No, I was very acutely aware of that. There is a...history is contested on this front, and since I wasn't there I can't contribute meaningfully to it. But there is a debate, let me put it no higher than that, as to which came first. Certainly John (Dugard) is implacable in his belief that it was the Centre for Applied Legal Studies, which came first. Again, I have to say I think that that...there is something petty about an argument around that. Certainly Felicia (Kentridge) was absolutely central in fundraising, and as you no doubt know, she assumed that responsibility for the Legal Resources Centre and raised, you know, very, very serious money on the Legal Resources Centre's behalf. I have to say they needed far, far more money than CALS did. I'm sure one can go back to the annual reports to see the kinds of budgets or the comparative budgets but they were really not comparable. But certainly I knew, and I think everybody associated with CALS knew, that Felicia (Kentridge) was essentially doing this quite extraordinary work of fundraising. I think the significance of Arthur (Chaskalson) lay elsewhere. Arthur (Chaskalson) was absolutely at the pinnacle of the Bar at the time and he was just regarded as one of the consummate advocates in South Africa. And it was his act of foregoing a private lucrative career to be the director of the Legal Resources Centre, which I think was absolutely essential to its credibility. *Interruption. Recording resumes...*

Int You were saying that Arthur (Chaskalson) was...fundamentally important for the LRC but in a different way from Felicia (Kentridge).

GM Ya, Arthur (Chaskalson), as I say, was regarded as a giant at the Bar and although he had been counsel in some of the major political trials in the sixties and the seventies, he had also been at the forefront of some of the major commercial cases. So he was regarded as a consummate advocate. He was a person who as an advocate demanded the respect of really everybody in the profession. So when he took the step of becoming Director of the Legal Resources Centre, one had to know that public interest law was very firmly on the agenda because of his personal example.

Int Absolutely. Arthur's (Chaskalson's) of course also credited with leaving a very lucrative commercial practice to start a public interest law organisation, the LRC. I'm also wondering, in relation to Sydney Kentridge, he was really a Trustee on the LRT that was set up as well, and I wondered whether you knew much about that?

GM Um...I did...you should bear in mind that, as I say, I went right through school with William (Kentridge), so I spent many, many hours at the Kentridge's house and so I knew Sydney and Felicia (Kentridge). Obviously I knew them sort of as a friend of their son's, so in a different capacity. Sydney (Kentridge) of course...I think Sydney (Kentridge) was described by Lord Denning as the finest advocate in the English-speaking world. And that's probably an accurate description. I mean, he as an advocate also was quite, quite extraordinary and he had a base in London and of course he took silk in London, so he had this absolutely commanding presence as an

advocate. In his own career I suppose it's fair to say that while he did some political work, the emphasis was on commercial work, whereas with Arthur (Chaskalson) I suspect it was the other way around. Arthur (Chaskalson) certainly did more political work. But between the two of them one is talking about really the two of the handful of leaders in the legal profession in South Africa. So all of that I think was terribly important in putting public interest law firmly on the agenda in South Africa. And it gave it a respectability and a credibility which I think was terribly important, not in it of itself, because I believe public interest law is terribly important, but in breaking barriers which existed in South Africa in persuading the establishment who really were at best indifferent to human rights, at worst hostile to human rights. That this was a respectable area of practice.

Int Sure. Gilbert...having known the Kentridges well, my understanding is that there was a very important legal aid conference in 1974 at the University of Natal, and then subsequently it was really Felicia (Kentridge) who had this idea of setting up the Legal Resources Centre, and I wondered whether you knew a bit about that?

GM Um, to be frank with you, I don't. I'm not aware of the legal aid conference to which you are referring, but, so it's probably best (laughs) that I don't even guess about it. But certainly, you know, there were the early public interest organisations...were things like: Legal Aid Clinics, the Black Sash Advice Offices, the Legal Aid Bureau, I think as it was called. And these were extraordinarily important but very modest operations. I mean, they were critical as the beginnings of access to justice for poor people. And I think that what the establishment of the Legal Resources Centre did, was that it did this on a far more organised scale, on a national scale and headed by very, very respected people within the legal profession.

Int Sure. Now in this milieu, the BLA was there and it seems to me there were some tensions with the BLA, CALS and LRC, and I wondered whether you knew much about that?

GM Certainly the BLA as I recall it was formed largely as a response to the Group Areas Act. And it was led at that time, again, if memory serves, by Godfrey Pitje. I would be hesitant to say that there was a tension between the BLA and CALS. I say this because I'm not aware of it. On the contrary John Dugard had a very, very close personal relationship with Godfrey Pitje. And I was...I, you know, was exposed to Godfrey (Pitje) at the time that I was at CALS and I'm not alive to that tension if it existed. Certainly one of the first things that happened...well, in the early eighties, it was in fact before I joined CALS, it was funnily enough when I was still at Webber Wentzel. One of the few things for which the profession can be commended at that time and in which I was quite heavily involved was organising defences for people prosecuted under the Group Areas Act.

Int Could you talk a bit about that?

GM Sure. Um...what had happened was...I remember this because I was on the Students Representative Council at Wits. I happened to have been in the office one day when a

call came through from Shun Chetty. I happened to have been in the office and I happened to have taken the call, it was just purely fortuitous. Shun (Chetty) was asking for assistance from students to take statements from people who were being prosecuted under the Group Areas Act. And I was one of those who as a law student got involved in the taking of statements. I then, as I say, I started my Articles the following year and interrupted it to go to Cambridge. When I came back the Group Areas prosecutions were in full flight, in fact the State took a decision to set up special Group Areas courts and as a result of the organisation of...as a result of the establishment of an organisation called ACTSTOP, the Action Committee to Stop Evictions, of which I became, as an article clerk, the legal advisor. Not that I knew much law then. The legal community in Johannesburg rallied around and in co-operation with CALS particularly, and the Legal Resources Centre and the Black Sash, it was resolved that every single case would be defended. And that occurred. And in fact we clogged up the system. And it all sort of...it successfully culminated in a test case, the case called *State vs. Adams*, in which John Dugard was involved – funnily enough I think that might have been the case in which the Bar Council refused him permission to appear with Jules Brody who argued that test case. John (Dugard) appeared in that case but not as a co-advocate with Jules (Brody). Funnily enough I was the person who took the statement fortuitously from the Adams’ when I was a student, so that in fact became the test case. There was...the test case in fact failed because the defence of necessity was raised. It was argued that the Adams’ didn’t particularly want to live in a so-called white group area, but that there was an absolute shortage of housing in so-called coloured and Indian group areas and that they were living there out of necessity. That failed and then the prosecution started in earnest again. And they came to an end in a case called *State vs. Govender*, in 1983. It was a judgment of Richard Goldstone’s in which he decided in that case that even if a person were convicted of contravening the Group Areas Act, it did not follow that the person would automatically be evicted. And one of the considerations which was relevant to whether or not a court should order the eviction of a person was the availability of alternative accommodation. So it was a sort of necessity argument but in a very different guise and when that happened the prosecutions actually came to an end.

Int Absolutely. I’m also wondering, you were at CALS at a very important time in the history of...in terms of legal change, as well as test case approaches, because the LRC had the Rikhoto victory and they had the Komani victory during that period...

GM Correct.

Int And I wondered whether you could talk about that and how being at CALS you understood those cases?

GM Those were the foundational cases at the beginning of the Legal Resources Centre. At CALS we were doing other work, I should tell you. We were doing work, for example, on forced removals. I was involved in a case concerning the forced removal of a tribe called the Bakwena Ba Mogopa, which was also a very critical test case after Komani and Rikhoto. John Dugard was doing cases around denationalisation of South African citizens, and I did a fortune of work on freedom of expression on

censorship at that time. So there was a sense in which we were all sort of working in our own areas but...the real debate is the one that I alluded to earlier, and that was, well, can the law be used as an instrument of change? And what were we doing as participants in that system?

Int Sorry, may I just interrupt and add this question, clearly you've seen that the law can be used but I was wondering in terms of...if Parliament was supreme under apartheid, would these legal victories not be overturned and was that a cause of concern at all?

GM You see, that was the peculiarity about the South African state at the time. The answer very simply is, yes. Any legal victory could be undone by Parliament. So the timing of these cases was very, very important. Because South Africa, or the South African state ironically, would frequently proclaim its allegiance to the rule of law. Of course it was a very distorted version of the rule of law that they embraced. The South African state would proclaim respect for the courts, would trumpet the excellence of our courts. So within their own paradigm they purported to operate within certain legal constraints. The Rikhoto and Komani cases were critically important, both in establishing rights under the pass laws, but they also came at a time when the pass laws were becoming a matter...well, they always were but the spotlight on this kind of rigid enforcement of apartheid was having an effect on the international attitude towards South Africa. It had a critical effect on the South African's state's protestations that they were reforming, and so the price of reversing those decisions would have been particularly great. They could easily have been reversed, there's no doubt about it. Any of these legal victories could have been reversed, but it would have come as a price...at a price, there's no doubt about that.

Int I'm also curious, especially in the US when I interview people there, they argue about the strange reverence that the Afrikaners had for the rule of law, and this is something that you've just brought up and I wondered whether you could talk about that?

GM Well...it is...one of the hallmarks of the apartheid legal order was this insistence of doing things according to law. Now the fact that the law was one passed by an undemocratic Parliament and may have been fundamentally unjust, was in a sense beside the point. There was still this insistence on doing things according to law, so some of the most terrible things that occurred in South Africa were done in the name of the law. And...it is ironic because it gave public interest lawyers a space within which to operate. I don't think that we did so naively, but there were enough significant victories – Rikhoto and Komani being good examples, the Bakwena Ba Mogopa case being another. There were just enough significant victories to keep the hope of...of change or the assertion of human rights alive. There were far more failures than victories. But the victories that occurred even in a repressive legal order were highly, highly significant because they did keep that hope alive. And you know, ultimately, it was very interesting in the eighties, where there were radical changes in Labour Law in South Africa, and that was work which CALS was very heavily involved in, particularly Halton Cheadle, Paul Benjamin and Clive Thompson. And then later Edwin (Cameron) as well. I did some labour work but not much. But the so-called Wiehahn reforms of 1980, which led to changes in legislation resulting for the first time in the recognition of black trade unions, that had a very, very profound

effect on the labour movement in South Africa. And major victories were achieved in the labour courts at that time. And of course trade unions in a sense became a surrogate for political parties which were not competent at that time. So it had a very, very profound influence on Labour Law and on the union movement. And it was the unions that were driving that process. Nobody forced the unions to go to court. The unions were taking employers to court and achieving victory after victory. And those early years...the first six years...six, seven, eight years of Labour Law were quite, quite extraordinary because over and over and over again, victories for workers were being clocked up in the labour courts. CALS I think in fairness, was absolutely at the forefront of that; I don't want to suggest that the Legal Resources Centre wasn't. In fact Arthur (Chaskalson) was involved in a couple of very, very important cases at that time as well.

Int But the LRC at some point, particularly around the early eighties, with Karel Tip and Charles Nupen and Paul Pretorius, steered away a bit from Labour Law, even though they were doing labour cases...

GM You know, the Charter, for want of a better description, of the Legal Resources Centre quite rightly required the Legal Resources Centre to act for poor people, people who could not otherwise afford legal representation. An issue arose at that time, as to whether or not the Legal Resources Centre should act for trade unions or for individual workers. There was a view in certain quarters that acting for a union, particularly some of the big and powerful unions, may not be consistent with the Legal Resources Centre's Charter. Whereas acting for individual workers might be. I'm not entirely familiar with that debate and how it's panned out. I simply recall it being an issue at the time.

Int Right. You might know this better than I do, at some point the Cheadle, Thompson, Haysom group formed a firm and they steered away from CALS. How did that actually germinate?

GM Well, they didn't actually steer away from CALS. I was there when this happened. It happened, I think, in 1983, roughly at the time that I joined CALS. And it was precisely the kind of institutional problem, which the Legal Resources Centre had to overcome, because they had both attorneys and advocates, as it were, practising under the same roof, which was anathema to the conventions of the organised legal profession. Because this was work for poor people, because these were salaried staff, because of, let me make it explicit, the esteem in which Arthur (Chaskalson) was held by the legal community, the Legal Resources Centre got a dispensation to do that from both the Law Society and the Society of Advocates. CALS faced the identical problem. I joined CALS as an advocate with a view to doing litigation. I could of course be instructed by outside attorneys, but the problem was, well what about in-house, if I can call it that, litigation which CALS wanted to do? And it was that which gave rise to the establishment of Cheadle Thompson & Haysom. They were put through hoops by the Law Society. They made it very, very difficult for Cheadle Thompson & Haysom to be established as a firm. These are things which those involved can tell you more directly. But it certainly was a problem. There was professional jealousy from amongst the attorneys' profession, particularly given the

magnitude of the work in the labour sphere that Cheadle Thompson & Haysom were doing.

Int Sure. Now Cheadle Thompson & Haysom went on to have a very high political profile given the types of cases they did. What was the perception of the LRC with relation to political cases, etc?

GM The issue arose really in the mid eighties with the successive States of Emergency. There was a State of Emergency proclaimed in June 1985 and it was repeated for the next five years. And during those States of Emergency tens of thousands of people were detained, including children. And it put enormous demands on the public interest community. Certainly I at CALS did a fair amount of work on behalf of detainees, and it was taken, I think, as axiomatic, that everybody involved in public interest work would do work on behalf of detainees. I know that the Legal Resources Centre did some of that work, particularly Mahomed Navsa. I was ultimately led by Arthur (Chaskalson) in one of the more notorious cases involving the detention of Dullah Omar, who became our first Minister of Justice in 1994. So the Legal Resources Centre did some of that work but I have a recollection that it was not without some difficulty. And I think, I don't know precisely what that difficulty was and I don't know how it played out within the LRC itself. They certainly did some of that work. I certainly know that members of the Legal Resources Centre would have wanted to do more. It may well be that there was a feeling that this was somehow not quite within the purview of what the Legal Resources Centre was intended to do. But I'm really not sure of that.

Int Sure. Some would say that the Legal Resources Centre, the reason for its success and its survival was that it was really careful in its...actually its choice of cases, etc, and I wondered whether you'd think it's accurate?

GM I think that that's true. But I think that that's one of the ingredients of successful public interest law. I've in fact just done a report on behalf of Atlantic Philanthropies, in which they asked us to identify a strategy for the most effective impact in public interest litigation. I think timing and selection of cases is critical to the ultimate success of any public interest law, whether under a repressive legal order or under a democratic legal order. And so I think that the choice of cases by the Legal Resources Centre and the timing of those cases, was very, very important. I absolutely accept that.

Int Gilbert, you were at the CALS until 1989? Is that correct?

GM 1990.

Int 1990. And then what happened?

GM Well, a number of things happened. Let me preface what I'm about to say by something important because I haven't yet said it. I think that John Dugard is an extraordinary pioneer of human rights in South Africa. I think that his inaugural lecture about the nature of adjudication, which was published, I think, in 1972, was a path-breaking work in South Africa. For the first time in South Africa he gave a perspective on how judges went about their work and he set about destroying the myth that judges did not have a measure of latitude in the way in which for example they interpreted statutes and the way in which they decided cases. So his work in that sphere and his subsequent book called *Human Rights and the South African Legal Order* were absolutely path breaking works. He together with Tony Matthews and the late Barend van Niekerk...well, the late Tony Matthews as well, were truly the only three academics in South Africa who were doing work on human rights. So I really think that his contribution cannot be underestimated and I have absolutely no regrets about the eight years I had at CALS. They were formative and I remain indebted to John (Dugard) to this day. Having said that I don't want to suggest that everything was perfect and I've already alluded to what I regard as the unfortunate tensions between CALS and the LRC. I was at CALS at a very, very difficult time in South Africa. I was there throughout the five successive States of Emergency. During that time I worked as an advocate on two of the leading treason trials in South Africa. I was one of the counsel in the so-called Pietermaritzburg Treason Trial and after that I became one of the counsel together with Arthur (Chaskalson), George Bizos, Karel Tip and Zac Yacoob, in the so-called Delmas Treason Trial. And that trial, of course, got completely out of hand. It was the longest trial in South African history, it ran for three and a half years, and it made substantial demands on me. I think for three successive years while I was at CALS, because of the demands of that trial, I took unpaid leave to work for two month stints or three month stints on critical periods in that trial. Um...by the time...by 1990 I had reached the point where I had been appointed an Associate Professor and I felt that my trajectory at CALS had more or less come to a standstill. There were difficulties, I think, in some instances quite unnecessary, being placed in the way of academic advancement for people at CALS. And I think...I thought, at any rate that I had sort of reached the point where it was unlikely that I was going to rise beyond an associate professor. I mean, what was left was becoming a full professor but I just felt that we were being made to jump through hoops, and I was not progressing as a professional, as an advocate in a way that I would hope. So, the transition had become, the Rivonia trialists had been released, (Nelson) Mandela had been released, and it was just a point in history where I thought I should go to the Bar full-time and that's really what I decided to do.

Int Ok. So you've been at the Bar since?

GM Full-time since, ya. I've maintained my links with the university, for which I'm very grateful because I enjoy it. I, for the past few years I've been a visiting professor in the law school at Wits. I've continued to write, although certainly not with the kind of intensity that is available to somebody in academic practice. So I've cherished that association and enjoyed it.

Int I suppose this... requires some introspection, but you left at a time when the country was indeed undergoing transition, but at the same time, from what I can understand

having interviewed people at Cheadle Thompson & Haysom, that the early nineties were a particularly horrific time because there continued to be detainee cases, political trials, etc. I'm wondering whether you missed it having gone to the Bar?

GM Um...it was an extremely tense time in South Africa but for somewhat different reasons. The tension was really between what seemed to be and which ultimately proved to be an inexorable drive towards democracy, and a conflict with those who were seeking to prevent that from happening. So it was certainly a time of enormous third force activity, of enormous violence, and, which rendered the transition at critical points extremely precarious. I carried on doing that kind of work in my early years at the Bar, so it's not as if I stopped doing that work at all. In fact, my career at the Bar is really essentially and has essentially been a human rights career, but laced with some important and very lucrative commercial briefs, which quite frankly give me the freedom to do the work that I particularly enjoy doing.

Int Absolutely. I wondered whether I could take you slightly back and if you could talk a bit about the Pietermaritzburg Trial and the Delmas Trial?

GM Sure, the Pietermaritzburg Treason Trial was a terrible important development because it was probably the first major trial of ideas since the 1956 Treason Trial. The '56 Treason Trial, as you know, put the leadership of the ANC on trial, and ran for a long time and ultimately resulted in the acquittal of everyone. The...what happened in the early eighties was the birth of the United Democratic Front. The United Democratic Front was a response to the so-called constitutional reforms, which were being mooted in 1982 and ultimately were implemented in 1983. In terms of which coloureds and Indians were given representation in their own houses of Parliament, House of Representatives and the House of Delegates. And the United Democratic Front was born in direct opposition to those so-called reforms, precisely because they were cosmetic reforms and left out of the count the majority of South Africans. And in no time at all it became a mass movement and the Pietermaritzburg Treason Trial was a trial of the leadership of the United Democratic Front for treason. What was significant about that trial in contrast to the Delmas Treason Trial, was that the state did not allege that any of the accused were involved in acts of violence in an attempt to overthrow the state. That's why I say to you, it was essentially a trial of ideas or a trial of ideology. And it involved the leadership, or some of the leadership of the United Democratic Front at the time. It involved for example: Frank Chikane, Cassim Saloojee, and others at the time...Albertina Sisulu. And I got involved in that matter, led by Ismail Mohamed...Zac Yacoob was a member of that team as well. Maruma Moerame was on the team, and Clifford Mailer. And the trial disintegrated after the cross examination of their so-called expert witness, a man by the name of de Vries, who had come to work to give expert evidence on revolutionary theory. And he was quite unable to link his theories of revolution with anything remotely connected to the activities of the accused, who were largely representatives of affiliates of the United Democratic Front. For example, the Natal Indian Congress, the Transvaal Indian Congress, the Release Mandela Committee. Those were all affiliates of the United Democratic Front. So in fact the trial collapsed after six weeks when their chief witness was destroyed, absolutely destroyed by Ismail Mohamed. It was a devastating piece of cross examination and de Vries completely disintegrated, so badly, that the

then Attorney-General of Natal, a chap by the name of Mike Imber, stopped the prosecution, which resulted in an acquittal of virtually all the accused. The trial continued in relation to some of the trade unionists but ultimately resulted in their acquittal. It was also a critically important trial because the judge was a man by the name of John Milne, who was regarded as one of the most progressive judges in South Africa at the time, and he took the unprecedented step of sitting with two black assessors. That was in 1985, I mean, barely 18 months later, the Delmas Treason Trial began. And because I had done so much work on the Maritzburg Treason Trial, particularly in relation to thousands of pages of documentary evidence, I was approached by Arthur and George to assist in the Delmas Treason Trial, which I was, you know, only too delighted to do, and not knowing at that stage (laughs) that it was going to run for three and a half years. But the Delmas Treason Trial was of an altogether different character. Because in Delmas the accused were all alleged to have been involved in acts of violence. In fact, there were, apart from the principal charge of treason, I think that the first alternative count or it might have even been the second count, I think, were five charges of murder, and a whole range of alternative offences under the security laws as well. By way of anecdote, in the Pietermaritzburg Treason Trial, I was mentioned as an unindicted co-conspirator because I...it's utterly ridiculous, what had happened was, I had attended...I had...one of the things I had done while I was at CALS is I had successfully argued for the unbanning of the Freedom Charter. And as a result of the unbanning of the Freedom Charter, the Freedom Charter was adopted as the manifesto of all the affiliates of the United Democratic Front of several of the big trade unions and the Freedom Charter was regarded as a subversive document. And I had spoken at a meeting, I think, of the Transvaal Indian Congress merely to recount the history of the Freedom Charter in the light of the work that I had done, and that resulted me being actually cited, although not formally charged, in the Delmas Treason Trial. My wife was cited as an unindicted co-conspirator because she was on the executive of the Detainees' Parents Support Committee, which was one of the affiliates of the United Democratic Front.

Int And...so after the trial ended you then left CALS ...?

GM The acquittal occurred, I think on the 12th of December 1989, so it was shortly thereafter that, that I left CALS, ya.

Int Ok. some would say that the Legal Resources Centre had its heyday really in the 1980s. When Arthur (Chaskalson) left in 1994 I think it was, he said very clearly in his farewell speech that the LRC's role as a public interest law organisation was to take on government if necessary, irrespective of what the government would be. And as you know the ANC is in government. What kind of problems do you think it poses in the post-apartheid era to then take on a liberation movement turned government where an organisation like the LRC had a similar ideological standpoint?

GM I think it does pose problems because the rules of the game have changed. I think that prior to the democratic transition in a sense the issues were black and white, to use perhaps an unfortunate metaphor. Under a democratic government the issues are not as clear-cut. We have an unbelievably progressive Constitution. The government is under a whole range of statutory constitutional duties to respect, protect, promote and

fulfil constitutional rights, and the role of the state under a democratic order is incomparable with the role of the state under the apartheid legal order. Having said that one of the critical aspects I think of constitutionalism is holding the state to its promises. And I think that particularly in the realm of socio-economic rights that has been an area of serious contestation. And it's interesting what's happening, I think, in South Africa at the moment. There is a parallel, but for very different reasons, with what occurred in the eighties. In the eighties, I think those who used the courts were not under any illusion that these were courts of justice in any real substantive sense. There was the hope and indeed sometimes the prospect of victory, but nobody could have entertained illusions about the nature of the apartheid legal order. But the courts offered anti-apartheid organisations and individuals a forum, which was denied to them in public life. So the courts were used as a site of struggle. Because the rules of the games in courts are different. It's a structured debate. You can have somebody standing up on your behalf, saying things on your behalf which would be very difficult in the political arena. And so the courts I think in some instances were self consciously and deliberately used by anti-apartheid organisations as a site of struggle, as I say, sometimes with important success. I think that to some extent we're seeing a parallel now where marginalised communities are also using the courts as a site of struggle. And I think one is seeing that in the realm of socio-economic rights litigation, where particularly for example, in the realm of housing, where people whose voices are perhaps not being heard as loudly as they should be in the political process, are now turning to the courts where they have a forum which hears them in a different way. I think one sees that in the realm of housing, one sees that in the realm of pensions, particularly in the Eastern Cape. One sees it in the water litigation which is currently taking place in Johannesburg as well.

Int Now the LRC has indeed taken government to court, the ANC government, and the TAC case being one of them, Grootboom, but largely it seems that it hasn't done as much and I wondered whether you had a sense of that as well?

GM You know, I'm hesitant to criticise any public interest organisation for not doing enough. I think one can never do enough. I think that in the realm of socio-economic rights litigation, these are very, very big and complex cases. I was counsel in the TAC case and I can tell you that...well, within the space of six months, we were in court five times – three times in the High Court and twice in the Constitutional Court – in extremely demanding, very draining, very hostile litigation. I mean, that case took place at a time when no lesser person than the president of the country was more than flirting with AIDS denialists. The litigation appeared to be directed from the presidency and it was every bit as hostile and as gruelling as any political trial I did in the eighties. So, I'm slow to be critical. I mean, I think one can always do more.

Int I suppose, my question really is that some say that the LRC isn't as vocal, that it isn't as apparent what they're doing, even though they do good work, I wonder whether you have a perception of that?

GM I think that there might be some merit in that, and I think that it might have a lot to do with really the transition in South Africa and the nature of the personnel. The litigation conducted in the eighties was high profile, was dramatic, and was

spearheaded by Arthur Chaskalson. We're now in a democratic environment in which the space around these cases is not as clear-cut as it used to be. It's contested. And I think that the level of contestation is quite important. The State believes, in most of these cases, that it is doing the best it can. It's not that easy to always assume the kind of moral high ground that one was able to assume in the 1980s, precisely because these are contested areas. I think there might be something in the criticism that it doesn't enjoy the profile that it previously did. I'm not sure that that's necessarily an important criticism. I think at the end of the day the real question is: are they doing good work? I have no doubt in my mind they are doing good work. I continue to do some cases for them, as do many of my colleagues. But we're in a different time now.

Int Absolutely. In terms of the cases that you do do for the LRC I wondered whether you could talk about one or two that you feel are significant?

GM Well, probably the most significant, or one of the most significant cases that I've done in my career, is the TAC case.

Int Right. Could you talk about that, Gilbert?

GM Yes. The TAC case...well, it posed an incredibly dramatic dilemma, and it was simply this. It was a case concerning the provision of antiretroviral drugs to prevent transmission of HIV from mother to child. When I was first approached about the case by the Treatment Action Campaign, the drug which was being used was a drug called AZT. There were two problems with AZT. The first was that it was incredibly expensive and the second was that its administration was complex. It required a fairly constant monitoring of the mother during the course of her pregnancy and the administration of the drug at various times. When we were approached by the TAC their agenda is self-consciously antiretroviral treatment for anybody and everybody living with HIV. At that time, which was sometime in 2001, the choice of a test case was difficult. We could have gone to court to compel the government to provide antiretrovirals for everybody living with HIV. I thought, and still think, that such an attack would have been doomed to failure because the sheer cost of the drugs was so prohibitive and the difficulties in monitoring and administration were so complex that I don't think we had any prospect of persuading even a well disposed court to give us that relief. There were then two other options. The one was the obligatory availability of ARVs to rape survivors. There can be no debate about the moral case for rape survivors; there was however a technical problem...I hesitate to even use the word technical, but it is simply this, that for obvious reasons there were no clinical trials on the effectiveness of ARVs for rape survivors. You couldn't ethically ever conduct such a trial. What that left was the provision of antiretrovirals for HIV-positive pregnant mothers. At the time we with incredible reluctance said, you can't go to court now. We will lose because of the cost of AZT and the difficulties in its administration, but, at that time there was a very important clinical trial which had been concluded in Uganda in relation to a drug called Nevirapine. Nevirapine was the closest thing that came to a vaccine, because the clinical trial had indicated that it was successful in 30-50 percent of cases in preventing transmission of HIV from mother to child. At that time there were estimated to be approximately seventy thousand children born HIV-positive, which meant that the administration of Nevirapine would

likely be successful in preventing transmission to the children in the order of between twenty thousand and thirty-five thousand. When we were approached Nevirapine had not yet been registered by the Medicines Control Council. There was scope for using Nevirapine despite its absence of registration, but we thought it was simply too dangerous. We therefore advised with incredible reluctance, that we had to wait until Nevirapine had been registered by the Medicines Control Council. I say, with incredible reluctance, because as every day passed children were dying; it's as simple as that. The Medicines Control Council then registered Nevirapine, and what that meant is that it was satisfied on two critical issues, namely that it was safe and secondly, that it was effective. We felt that with registration the safety and efficacy of Nevirapine is something that the state couldn't contest. The other remarkable thing about Nevirapine was that not only was it effective in 30-50 percent of cases, but it was incredibly cheap. The cost of the requisite dose of Nevirapine was ten rand. Apart from that the manufacturer of Nevirapine, Boehringer Ingelheim, had offered free supplies to the South Africa government for five years, which I should tell you they rejected. In addition to that its administration was as straightforward as you could imagine. All it required was one pill when the mother went into labour and a few drops when the baby was born, in relation to the weight of the child. So it was as straightforward as that. So we waited until Nevirapine was registered, we then sent a letter of demand to the national minister of health and all the provincial ministers of health. Because the state in its insanity at that time had decided to confine the availability of Nevirapine only to two pilot sites per province. So if you were an HIV-positive mother and you couldn't give birth at one of the pilot sites, the consequences were very probable that your child would be born HIV-positive. So that's the case we took, and as I say, it was fought with a ferocity which was reminiscent of the way in which the State fought political trials in the eighties, and it was precisely because of the President's flirtation of the dissident's cause. And it was very draining, very hostile litigation, which I should say we won at every step of the way. Five appearances, three in the High Court, two in the Constitutional Court, we won every one. Again, question of timing absolutely critical. The impetus against the denialist movement was just growing by the day. The Treatment Action Campaign is in my view the most effective NGO in this country. Their mobilisation around the issue, not simply in South Africa but internationally was enormous. And I think that that all contributed to the successful outcome. But it was extremely stressful litigation.

Int What in your mind was the role of the LRC in terms of how effective...its contribution was to that case?

GM Well, I think to put it bluntly, it couldn't have happened without the LRC but I need to be more specific than that. It was the LRC in the guise of Geoff Budlender, who is a vastly experienced attorney and brought to bear the kind of attention to detail which was critical to running a case of that magnitude. I have never been involved in a case in which every single decision was so carefully planned and caucused in advance. Every letter was drafted, was redrafted, was debated. So it was critical, I think, to the eventual outcome of the case.

Int Some would say that that TAC case had some unfortunate ramifications, particularly for Geoff Budlender, and I wondered whether you had any sense of that?

GM Um...I think that that's a distinct possibility. I think that Geoff (Budlender) had, and I think still has, ambitions to become a judge. I think that South Africa would be incredibly fortunate to have a judge of his calibre on the Bench and I think that he put himself in direct conflict with the state in that case, and I think that together with other factors may well have had an influence on his lack of success in becoming a judge.

The following pages (21-29) are placed under embargo at the Interviewee's request.

Int Now...we have an election coming up and clearly people are positioning themselves to get into the new government. But what you see is a larger drama where the President of the country has effectively been so marginalised and sidelined that one can't help, even though the fact that he's made serious errors, the AIDS being one of them...that he cuts an extremely lonely figure and one feels sympathetic for him...

GM I think that in many ways Thabo Mbeki is a tragic figure, almost in the Shakespearian sense because he's going to be remembered for...principally for two terrible blunders: that is his AIDS dissidence and his stance on Zimbabwe. You know, if there are going to be two phrases which are going to haunt Thabo Mbeki for all time it's going to be in the first instance that he doesn't know anybody who's died of AIDS, and secondly that there is no crisis in Zimbabwe. I met Thabo Mbeki, in fact, in 1989 in Europe. And...I like him on a personal level, and to the extent that anybody could ever fill the shoes of (Nelson) Mandela, he seemed to the obvious person. But things have gone horribly wrong in his presidency, and I'm concerned that the political drama that is now unfolding is probably primarily attributable to him. It's difficult to assess Jacob Zuma's support because I think that there are two components to it. I think that he has genuine popular support and he has a likable personal character and that's perfectly understandable. But I think that there is a significant component of an anti-Mbeki vote which took place at Polokwane. I don't know how to measure the proportions of the two. But I think that there was at least a credible chance that if (Thabo) Mbeki had had the humility to stand down at Polokwane and if a credible candidate had been put up, we might not find ourselves in the situation that we are today.

Int Speaking to people, both formally and informally they say, well, anyone but (Thabo) Mbeki, and it seems that (Jacob) Zuma is a default choice as candidate. And some would say that the ANC is rather inscrutable. What's your sense of what went on at Polokwane because it's clearly that they didn't expect this; it was a shock?

GM Well, clearly President (Thabo) Mbeki didn't expect it, but I'm led to believe that he believed until the end that he was going to romp home. And I think it's part of a malaise which has characterised the Mbeki administration. And it is that he has surrounded himself by people who are not giving him the kind of independent hard-

nosed advice that he ought to be getting. He's rather seemingly surrounded himself by 'yes men', and he's been very ill served by that. I'm led to believe that Snuki Zikalala, of the SABC, conveyed to his fellow reporters at the SABC who covered Polokwane, that an (Thabo) Mbeki victory was assured. So you've got propaganda being put out on the SABC, you've got people surrounding (Thabo) Mbeki, telling him things that he probably wants to hear rather than things that he should hear, and that's a recipe for disaster.

Int It's also a recipe for a grander disaster because from what you've told me, the word independence seems to be absent in this because there seems to be a sense that the judiciary and the media etc, should be organs of the state.

GM Ya. No it's...I agree with you, it...there is a portent of disaster for key institutions. The judiciary being the most important, I think, but others as well: the media – one of the resolutions taken at Polokwane was some sort of statutory regulation of the media. You know, I try and look for a bright side to things and I think that that is important. One of the things which I think is important is the sheer dissension within the ANC that we witnessed at Polokwane. There is a perception of the ANC as a monolithic and inscrutable organisation, which I think in the main it is. But there is something very important about what occurred at Polokwane and that is really the opening of a schism within the Party, which I think that in a different time would have been completely contained. I think that the power and the discipline of the organisation would have been such as to prevent that kind of public show of dissension.

Int And would you attribute this kind of loss of discipline, let's call it that, to (Thabo) Mbeki's leadership and ruling?

GM Ya, I would, I would.

Int In trying to find a bright light to all of this, the Constitution has been described by Jack Greenberg, in the interview I did with him, as the most advanced document in the world. As a lawyer, I wondered what your sense is of how the Constitution is empowered or imbued with protection mechanisms to survive all these political machinations?

GM I share Jack's (Greenberg) assessment of our Constitution and of course again it's a product of its time. The United States Constitution is 200 years old. So it's a modern Constitution... *(Interruption. Radio broadcast in background –largely inaudible)*

Int So what is the outcome?

GM From what Jenny (Marcus) tells me...Jenny's my wife, and from what I could hear from the radio broadcast, is that in one of the judgments there was one dissent. So it's ten/nil and nine/one.

Int So what implications does this have?

GM The implications seems to be that this...that the searches and seizures were lawful, that to the extent that there are complaints about them, that is a matter for the trial judge and there appears to be quite a strong statement from the court saying that these interlocutory skirmishes should not be permitted to stand in the way of an expeditious trial.

Int Right. So, what happens next?

GM (laughs) Well, on Monday, there is an application by (Jacob) Zuma in the Natal High Court, in which interestingly enough he's going to be advancing an argument, which is not terribly dissimilar from that which Judge Hlophe is arguing. Jacob Zuma is going to be arguing that his prosecution is invalid because he was not given a hearing before the charges were instituted against him. That is pretty much what Judge Hlophe is arguing as well. That he was entitled to be heard by the judges of the Constitutional Court before the lodged a complaint against him. I have to tell you that in the Judge Hlophe case, and I hope that my words don't come back to haunt me but I find the argument bizarre.

Int Do you think this ruling will have any bearing on...(John) Hlophe's case and...?

GM I'm not sure, I mean, I think that the context is very different but...I would therefore be very surprised if it has any bearing at all. These were searches and seizures done pursuant to a criminal investigation. I will obviously read the judgments but I would be surprised if they have any bearing on the latest matter.

The following 33 lines are placed under embargo at the Interviewee's request

Int Absolutely. I'm also wondering...you've done a lot of work on freedom of expression, and I wondered in light of all that is currently going on, whether you could talk a bit about how that can be abused, especially in a democracy that is very fragile and fledgling?

GM Ya. I do fear for the abuse of freedom of expression, and people who ever read or hear this will laugh at me because they regard me as a free speech fundamentalist. I think that the more recent pronouncements, particularly by Julius Malema, are incredibly dangerous. And I don't think that one should be naïve about the potential impact of inciting speech. We know...we know what happened in Rwanda for example. I'm not equating the two, I'm just really making the proposition that speech can be extremely damaging. And I think that what we're witnessing at the moment is a failure of political leadership. And as I have said repeatedly there is one person in whose power it is to stop this and he's not particularly interested in doing so. And I think it is dangerous, I think we're fourteen years into democracy, I think that the Constitutional Court has been the most successful post-apartheid institution and it's now under very severe threat. I think that political stability is threatened when people can get away with what in a normal society would be regarded as an incitement to violence. I think there's a serious problem there. And you see there is an incipient threat there and it has a political motive and a political agenda. It is foreshadowing a risk, I don't know whether it's real or not, but it's foreshadowing a risk that if you prevent (Jacob) Zuma from taking what they regard as his rightful place as president, there's a risk of violence.

- Int Right. Given that South Africa has had a negotiated revolution and many of the youth activists feel a bit hard done by about that, I wondered whether you could talk about revolutionary consequences in your estimation?
- GM I think that we're emerging from the honeymoon period. I think that there have been areas of the transition which we can see now have not been adequately or properly managed.
- Int Such as?
- GM I think poverty is an absolutely critical area. I think that the Truth and Reconciliation Commission was a fantastically important institution in managing the transition. But there are areas which have simply been neglected. I don't...and I'm not saying it's necessarily the TRC's fault. The whole reparations issue has been, I think, not properly dealt with and I think it's the government's fault not the TRC's fault. And I think that there are institutional problems which I think are inevitable but which are not yet solved. We see it for example in our own profession, debates around governance at the Bar, and amongst the attorney's profession, are fraught with difficulties and I think that that's a product of time, but in that process I think it's very important that core institutions are protected and that's why I'm very, very fearful of these attacks on the Constitutional Court.
- Int Sure. I'm also a bit concerned because it seems to me that the political drama is being played out through in the legal domain, and by this I'm talking based on media reports solely about amnesty....I think it's the National Prosecutions Act?
- GM Yes.
- Int And then also about how leaders can't be prosecuted with regard to the arms case, etc. I wondered whether you could really elucidate those?
- GM Well, the first case you mentioned, in fact, is my case. And it's a Legal Resources Centre case...
- Int Right, a Legal Resources Centre case, exactly.
- GM ...and it was meant to be due on Monday and it's been postponed. (laughs) You know it's my case therefore I have a bias, but...I do think it's an important issue. What happened at the 11th hour of the constitutional negotiations was that a deal was struck between (FW) de Klerk and (Nelson) Mandela as to what to do with really the generals in the army and the senior people in the police. And it truly was an 11th hour arrangement, it only found its way into the interim Constitution as a postscript, it was that 11th hour. And the deal struck was that there would be amnesty in exchange for truth. And politically the deal was important because (Nelson) Mandela couldn't be sure of the loyalty of the Security Forces. And this was a way of ensuring that there

would be a stable transition. And certainly I would imagine (FW) de Klerk was playing up that risk. So that was the deal that was struck and that gave rise to the Truth and Reconciliation Commission and the applications for amnesty and the like. The truth of the matter is, is that (Mangosuthu Gatsha) Buthelezi, amongst others, virtually boycotted the proceedings. There were many, many apartheid operatives who managed to stay below the radar, didn't apply for amnesty, and have never been prosecuted. The TRC's reports did not find favour with either the ANC or the Nationalists. And there's this ongoing problem, and that is that there are people out there on both sides of the political divide who have not sought amnesty and have not been prosecuted. So the prosecuting authority together with the government formulated these guidelines, and we say they dispute that these guidelines are an attempt to reintroduce the amnesty process in a new guise. They are an attempt to vest the National Director of Public Prosecutions to grant an immunity from prosecution for essentially the same reasons that permitted the granting of amnesty by the Truth and Reconciliation Commission. We say that that is unconstitutional. They deny it. They deny it on the basis that we misinterpret this policy. They say the policy is the very opposite of what we say that they recognise, they have a duty to prosecute and will prosecute. Well, we part company fundamentally on what this policy means. We say you've just got to read it to see that the National Director of Public Prosecutions is given the ostensible power to decline to prosecute for essentially all the same reasons that would have qualified for the grant of amnesty. We will fight that out.

Int Absolutely. And the next case where the Information Protection Act, I think it's called...

GM Yes.

Int Could you talk a bit about that?

GM Well, you know, all states like their secrets and I don't suggest that there is no place for genuine official secrecy in a democracy. Up until now we just haven't had a modern statute to deal with official secrecy and we've got really apartheid legislation which governs it. But the struggle for information is a critical struggle and, you know, people in the Intelligence Services, I think the world over, see the world differently from mere mortals. And what we would regard as entirely innocuous they see as sinister. So there's been an ongoing struggle about the legitimate boundaries of secrecy and the demands of openness. And we're seeing that played out now in this draft legislation. I've glanced at the new Bill, I can't say I've studied it in detail. I think in fairness one has to say that it's a substantial improvement on what we've got. But as is not untypical in these areas, the net is cast very, very wide, and there is a potential for criminalising the disclosure of a kind of information that manifestly should not be protected under the guise of national security. Um...you know, were it not for the current debates and attacks, I would say to you, well this is not something to worry about really, because we've got a Constitution and if this legislation goes too far it will be challenged and the Constitutional Court will strike it down. I'm afraid that, you know, what is going on is an attempt to weaken precisely the institution of the Constitutional Court and to...and that's what's so worrying.

Int The fact that there's impunity being granted for government officials and to protect them against corruption, which is a core cause of concern in this country...

GM Sorry, you're making a leap. The prosecutorial guidelines are designed to deal with the granting of immunity from prosecution for crimes committed with a political objective. It's not clear to me at all whether corruption in the arms deal could conceivably be covered by that, in fact they wouldn't be because there is a cut-off point and the cut-off point is 1994. So I don't think that the prosecution's policy, bad as we think it is, could be used to protect people from corrupt dealings in the arms procurement process.

Int Right. What about corruption more generally?

GM Well...I mean, I think it's a malaise which has beset our country. I think that...I'm concerned about the level of commitment to fight it. (Thabo) Mbeki says the right things but they're not translated into action. I think the disbanding of the Scorpions is a very worrying development in that sphere. And...you know what concerns me is that there is an apparent lack of appreciation that corruption is truly a human rights issue. It's recognised as such in other countries, but there is not that link in the public discourse in this country. And, you know, the sooner that link is made the better. Is that corruption is genuinely a human rights issue. I mean, when one thinks of corruption for example, in the payment of social grants. The simple truth of the matter is the poorest of the poor are the ones who are being prejudiced by that corruption. Whether it be in feeding schemes or any other form of social grants, that's where corruption appears to be thriving, and it's a very worrying thing.

Int Ok. This leads me to ask about your report on public interest law that you wrote with Steven Budlender, and I wondered whether you could talk about that?

GM Well, we were asked by Atlantic Philanthropies to do an evaluation of public interest litigation in South Africa, with a view to identifying the most effective strategy. The important thing about it was that they didn't want it to be an evaluation of the organisations that receive funds. So what we did is we designed a questionnaire for all the major public interest legal institutions in South Africa, but coupled with an assurance that, firstly, it was not an evaluation of the organisation, and secondly, that we would assure them anonymity. So what we were interested in doing is getting their very frank views, which we would wish to disclose in any report that was forthcoming but without attributing it to them. So that's what we did. In addition we conducted interviews with a whole range of important players, including judges, Chief Justice Langa, Chief Justice Chaskalson, and others, and we focused on a number of cases as being illustrative of the kinds of strategies that we thought worked best, or where things had gone wrong. And we in fact looked really at three broad areas. We looked at the... *interruption* We looked at the TAC case as being the best example of the most effective strategy, because it brought together all the elements that we thought were indispensable to effective public interest litigation. We also looked at what we called 'the gay rights litigation' as being a sustained strategy to achieve particular

goals, and we looked at the Grootboom case, really as an interesting example of a case which was sort of born out of chaos and was not strategized at all, but which had very important implications for socio-economic rights litigation. And we then identified the most effective strategies and the key components for those effective strategies.

Int Now some would say that the Grootboom case was extremely important, but what's happened subsequently has just not played the judgement out successfully. I wondered whether you could talk about that?

GM Well, there are two ways of looking at the Grootboom case. Those who are critical of it say: but Mrs Grootboom never got her house. Which of course is true. There is another way of looking at it and that is that what the case was really essentially about, was the ambit of socio-economic rights and the duties of the state in implementing those rights. There is some validity in the first approach. I think that its true value lies elsewhere. You've got to bear in mind that this was, as I say, a case born out of chaos. It was an application for an eviction which came before a magistrate. The community whose eviction was being sought, was not represented. The magistrate thought that they should be represented, so he phoned up a friend of his who was an attorney and said, won't you come and represent these people. The attorney did not have a background in Constitutional Law, and in fact his initial attitude was that there was no defence to the application for eviction at all. And so it had a somewhat inauspicious start. And it only truly assumed its real importance when the LRC intervened for the first time in the appeal before the Constitutional Court. It was the very antithesis of the TAC case, there was no organisation involved. There was no groundwork, which had been done before the case was launched. The case had no strategy behind it whatsoever. And most importantly there was no follow-up. Now this is not the fault of anybody, it's simply the way that the case developed. I know, because I've done work for the state, that that case has a hidden impact and its true impact for me lies in the way it has influenced the thinking of the state. I've done a number of cases in which the state has displayed a consciousness that requires of them to follow the Grootboom formula. They need to have a plan. Those whose needs are greatest must be addressed first. There needs to be a progressive realisation. Now I'm not suggesting that the state gets this right all of the time, in fact the opposite is probably true. But I am suggesting that there is an increasing consciousness of where the state's duties lie, and certainly in those cases with which I have been involved there has been a consciousness of what has to be done. the fact is that Mrs Grootboom didn't get her house, that is a consequence of how that case played itself out. There was a lack of follow-up, there was a lack of organisational infrastructure. I think differently handled the outcome would have...or that consequence would have been different.

Int When I interview lawyers, particularly those working with land redistribution and housing they often say that, yes, it's all very well, a judgment gets passed, the Constitutional Court is fantastic, but the State does not co-operate.

GM Ya. You know, I think that one has to distinguish a range of reasons for lack of implementation. I think Geoff Budlender has written an important article on this and I'm probably going to get his categories wrong. But he identifies in essence three

categories. He...the first category is incompetence. In other words it's not for want of implementing things, it's just that they don't have the capacity to do so. Another category is indifference; they just don't care. The worst category is obstruction. I should tell you in the TAC case there was what we believed some evidence of obstructing the court's order in the province of Mpumalanga. It in fact resulted in us launching contempt applications, which we ultimately didn't proceed with because the MEC for Health put up an affidavit, which showed on her version, extraordinary incompetence, but we weren't quite sure that we could make the case for actual obstruction. So I think that there has been a problem with implementation. I think that the instances of obstruction are rare. I'm not saying they're non-existent, but it's a problem. We can have this wonderful Constitution, which we do. We can have this extraordinary Constitutional Court, which we do. But ultimately the Constitutional Court doesn't have a police force, the Constitutional Court can't compel implementation of its decisions. That depends on the State. It depends on political will, it depends on resources. But above all it depends upon a commitment, and I accept that has been lacking.

Int I'm given to understand, and correct me if I'm wrong, that contempt orders are frequent but not really obeyed by the State. Have you heard something to this effect?

GM Um...I suppose when you say frequent, it's a bit like how long is a piece of string?

Int (laughs) Right. There have been several, let's put it that way.

GM Ya, there have been. And certainly nobody...no government official, of which I'm aware, has gone to jail for failure to implement a court order. I think it's part of a broader problem. I in fact argued a leading case on contempt of court.

Int This has been recently?

GM This was a case against, believe it or not, the Auditor General, who was under compulsion to furnish information about the arms deal. And didn't do so or didn't do so sufficiently or timeously, and there was an application brought for him to be put in contempt which he was. I think he got a thirty day suspended sentence and I took it on appeal, and he was acquitted of that, and the Supreme Court of Appeal laid down certain constitutional parameters for contempt of court. But in the work that I did for that case, what struck me forcibly, is how weak our contempt jurisdiction is in this country. I was absolutely amazed at how in the UK for example, and in America for example, you go to jail for disobeying a court order. You can go to jail for a long time. And I think that there has been a serious lack of appreciation of that in this country. I quite frankly can't think of anybody who's gone to jail for contempt of court. I'm probably wrong in that but there is certainly not an ethos of obedience to court orders. So I'm saying that's a...I'm putting that at a general level. And certainly that is a problem at the level of state officials who don't implement court orders.

- Int Now, again, I could be...I stand corrected, but I'm under the impression that this is going to be challenged, the lack of obedience as such to court orders, is this true?
- GM I'm not aware of it. I certainly know around the pensions litigation in the Eastern Cape, I mean, this is where this has all just mushroomed, and...
- Int And this is where the LRC is very important...
- GM Absolutely. The LRC has absolutely spearheaded those cases. And, you know, the legal process takes time, but it seems to me that the foundations for people going to jail for deliberately obstructing court orders is now quite close. Quite frankly if it is a case of deliberate obstruction I don't know what else you do.
- Int There's always been a tension in the LRC...from the time of its inception, between going for high impact litigation, test case approaches, and then really seeing to the everyday needs of the ordinary person who comes in, whose concern may be minute but actually is very important to them, central to their being. What's your sense of this tension because it speaks to funding and the time of lawyers, etc?
- GM I think it's a tension inherent in public interest litigation. This is funded litigation. I mean, up until relatively recently the Legal Resources Centre, as with all other public interest institutions in South Africa, was utterly dependent on foreign funding. Couldn't raise money locally. And I think today the situation is not a great deal better. So it's a question of how you deal prudently with your limited resources, and the natural instinct is that you need to identify cases, which benefit as many people as possible. In that process, of course individuals do benefit, but it means that your focus is on identifying a particular kind of case which may frequently be at the expense of an individual, who might otherwise have a very good case, but because their particular case is not representative of a broader class, the organisation, whether it be the LRC or anybody else, will feel reluctant to take on the case. So I think it's inherent in the nature of public interest litigation, is that you have to make choices. And you have to make the most effective choices. In many ways that's what our report for Atlantic Philanthropies is about.
- Int Right. In terms of making those choices what is your sense of the key areas of public interest law, areas that need to be focused on?
- GM At the moment in South Africa?
- Int Sure.
- GM I...well, I...I need to make a point of departure. I think the point of departure is that law has its limits. People tend to look to the law when other institutions have failed. I think however that in a democratic society we need to be more sensitive to the fact that the law is not always the best solution. The problem we have is that we've got

good institutions in South Africa but many of them don't work. So we have to recognise, as we did in the old days, that resorting to law has its limits. If you were to ask me where the areas of priority today are, I will give a broad category and then a narrower category. I think that the broad category has to be poverty. And now of course poverty manifests itself in a whole range of guises. And there are subsets, if you like, of poverty. So I think that things like social grants are enormously important. I think education is enormously important. I have been approached to bring a case on education. It's no good saying, 'bring a case'. One has to identify an important area. One has to identify the impact of that area on education as a whole, etc., etc. I stress, these are big and difficult cases. But as an umbrella I would say poverty is the...has got to be the area focus and then under that umbrella there are pockets which will obviously attract particular attention, and I think education is one of them, school education. And I think there are terrible, terrible problems in rural schools and lack of facilities, buildings, desks, books, you name it. And somehow or other that has been terribly, terribly neglected, and the courts may not be the best place for it, but I think that's got to be one of the big cases on the horizon.

Int Gilbert, I'm aware that I've asked you a range of questions, perhaps exhaustingly so, and you've been very kind. I'm wondering whether I've neglected to ask you something which you really feel ought to be included in your Oral History interview?

GM I can't think of anything that you've really neglected. But I do think, speaking for myself, I cannot underestimate the value for me personally of people like Arthur Chaskalson and John Dugard. I mean, they are both truly mentors of mine and have been critical in the direction that my career has taken and inspirational to particularly my generation of lawyers. I am concerned today that public interest litigation doesn't have the kind of appeal that it seemed previously to have. I'm really not harkening back to the so-called good old days. But I do think that one cannot ever underestimate the personal impact of people like Arthur Chaskalson. The current generation in the main are people who have clerked under his Chief Justiceship, in the Constitutional Court. Many of them are now members of this group. Steven Budlender, Kate Hofmeyr, Isabel Goodman, Anshal Bodasingh, Nasreen Budlender. They are people who have been inspired by Arthur (Chaskalson). They truly, truly have. I'm just concerned that so much rests on the shoulders of one person. And, I appreciate we live in a different country today, but, you know, there's a massively pressing need for public interest litigation. I'm concerned about funding drying up. The Atlantic Philanthropies have got a policy of spending down. Their grant is going to be exhausted, I think, by 2016 (Correct date is 2018). Very worried about that. There's no obvious organisational institution, which is going to fill that gap. So, you know, I think that one cannot ever underestimate the legacy of Arthur (Chaskalson), in particular, and John Dugard, and the others, again, it's invidious to mention names because I don't want to devalue the role played by anybody else there. I just have this concern about perpetuating that legacy and it's not clear to me that those foundations are going to last.

Int I'm just going to piggyback on that. Some would say that Arthur's (Chaskalson's) stewardship of the Legal Resources Centre, particularly during the 1980s, was so excellent that somehow it left a huge leadership vacuum when he left the Legal

Resources Centre, and that since then it's really battled with managerial leadership issues, and that may to some extent, account for the fact that even though, as you have so clearly elucidated, the LRC does enormously important work in the post-apartheid era, but it somehow has not really gotten that reputation, or not maintained its reputation.

GM I think that there's some truth in that. I also think it cannot be divorced from the different function that the LRC is called upon to perform in a post-apartheid South Africa. As I say, up until 1994 the issues were absolutely clear-cut. There was no real debate around them. The issues are now contested and there is an allegiance to the new regime because it's the regime of liberation. And this is what they have fought for and the opponents, what used to be the enemy, very difficult to label the enemy today. So, I think it's a product of two things. I think that Arthur's (Chaskalson's) stewardship set a damn high impossible standard to meet; I accept that. but I don't think that's the only reason for the different position in which the LRC finds itself today. I think the issues have changed and I think that the personnel have changed.

Int Right. I always end the interview by asking about a particular memory you might have, and of course you've given me wonderful examples of cases. I'm wondering whether there's a particular memory you have of working with John Dugard or Arthur (Chaskalson) or George (Bizos) or even a case that you actually treasure in relation to public interest law litigation? I'm sure you have several (laughter).

GM Um...look, at a professional level, and by that I mean as an advocate, I didn't really work with John Dugard as an advocate, I never appeared with him; I once defended him. So my experience as a professional would be one in many cases with Arthur (Chaskalson) and George (Bizos) and there are many memories. I suppose it's difficult ever to escape the shadow of Delmas because it was three and a half years, it was truly, truly gruelling, not so much for Arthur (Chaskalson) and I because neither...Arthur (Chaskalson) and I were not there full-time. George (Bizos), Karel (Tip) and Zac (Yacoob) were there every single day. We used to meet weekly at Arthur's (Chaskalson) house because Arthur (Chaskalson) was the leader of the team and there would be report backs and Arthur (Chaskalson) would give guidance, and those are critical memories for me because, you know, I was a relatively young lawyer, thrust into this extraordinary environment and really just absorbing the lessons that were there on offer. I should tell you that for an example of commitment and hard work it's difficult to imagine a greater commitment than George (Bizos) and Arthur (Chaskalson) in different ways. George (Bizos) as I say was there day in and day out, giving his all. Arthur (Chaskalson) has got an unbelievable capacity for sustained hard work. Which I suppose is a mark of his greatness. He never left a stone unturned. Two things: first of all, as things panned out, I have memories for at least, on two years of that trial, working at Arthur's (Chaskalson) home on Yom Kippur, which is the most sacred day in the Jewish calendar, and with both of us fasting but working. And me sort of really struggling and Arthur (Chaskalson) working away, you know, on a 24-hour fast. That was the one sort of abiding memory. But the other one was the appeal against the conviction in the Delmas case. Just to put it in context, what had occurred was a dramatic development halfway through the trial, I remember it well, it was the 10th of March 1987, it was my wife's birthday, I knew it. I wasn't

in court that day. I got a phone call during the day to be told that the judge, Judge van Dijkhorst, had fired one of his assessors. And we immediately set about working, we met at Arthur's (Chaskalson) house that night, Arthur (Chaskalson) took the view then and there, that this rendered the...if the trial were to continue it would be fatal, a fatal irregularity had occurred. What then happened was we brought an application to stop the trial and it was really a truly dramatic event in the trial because the assessor who had been dismissed, was a man by the name of Professor Joubert, and he had gone on oath as to what had occurred and he had revealed things about his relationship with the judge, which we said were absolutely foundational. He put up these affidavits and the judge was apoplectic with rage, absolutely beside himself with anger. And he sought to preclude us from relying on the affidavits for the application we were bringing. And Arthur (Chaskalson) made it clear to him that reliance upon those affidavits was integral to the case we were bringing, and he threatened Arthur (Chaskalson) with contempt of court. He said, if you rely on those affidavits I'm going to hold you in contempt. It was an extraordinary and dramatic moment. It paralyzed our capacity to advance that application. Arthur (Chaskalson) asked for an adjournment. The judge was reluctant even to give us an adjournment. We needed to consult with our clients. The judge gave us fifteen minutes. We went down to the cells below the court in Delmas to consult with our clients, and you know, I remember Arthur saying, you have a choice to make, you can see what has happened, I'm...reached the point where I can't advance this aspect of your case any further. You are at liberty to dispense with our services if you so choose. And it was a very, very dramatic moment and I remember the judge's registrar interrupting us, because we had exceeded our fifteen minutes, and I just remember the accused in that case, you know, include people like Terror Lekota, and Popo Molefe, real leaders, just putting their complete faith in Arthur (Chaskalson) in particular and in the legal team, and, you know, having to go up and then sort of carry on under this extraordinary disability. So those were, you know, extraordinary memories, but you know, there are many of them, there truly are. That's one that certainly stands out in my mind.

Int Gilbert, I want to thank you for a most extraordinary interview. I hadn't anticipated this. And also, I think, I should say on record that having interviewed more than 50 LRC lawyers, your name comes up very frequently, and particularly among young lawyers, who have said that in some way or another you have really influenced them and had a marked...effect on their legal trajectory...

GM Well, that's very nice to know. Thank you.

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